Supreme Court, U.S.
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No.

In The

# Supreme Court of the United States

October Term, 1996

CHARLES WILLIAM BOYLE,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

*Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

Boyle respectfully submits that the following issues justify a grant of Boyle's Petition for a Writ of Certiorari and reversal of a Panel of the Fifth Circuit's Opinion in this case.

1. Whether the decision of the trial court to delete all overt acts from the single count 18 U.S.C. § 371 conspiracy charge before submitting the indictment to the jury constituted plain error mandating reversal? (11a-12a). The trial court's unprecedented action resulted in the jury receiving an indictment that was invalid under the law as well as an indictment that differed materially from that issued by the grand jury and, thereby, constituted *per se* reversible error. *See Stirone v. United States*, 361 U.S. 212 (1960).

2. Whether the Panel erred in holding that the trial court's erroneous and misleading answer to the jury's question regarding the overt acts, an essential element of the charge, did not constructively amend the indictment. (15a-18a). The Panel accurately concluded that the jury was manifestly confused as to the overt acts at issue in the case due to the trial court's decision to delete the overt acts from the Indictment. (16a-18a). The Panel accurately concluded that the trial court's answer to the jury's question, which referred the jury to the incomplete indictment, was "erroneous and confusing." (18a). However, the Panel erroneously concluded that Boyle had failed to object and that the trial court's erroneous answer did not require reversal under the plain error standard of Rule 52(b). (18a). Boyle submits that the jury's manifest confusion on the issue of the overt acts and the trial court's giving confusing and erroneous charge mandates reversal. Most importantly, the Record is devoid of any evidence that the trial court gave notice to Boyle of the jury's question and the trial court's response to the question.

3. Whether the trial court's deletion of all overt acts, the government's erroneous and unsupported closing argument, the trial court's initial confusing instructions to the jury and the trial court's confusing and erroneous response to the jury's question effectively and constructively amended the indictment?

4. Whether the Panel erroneously applied the "plain error" standard of Rule 52(b) in assessing whether the alleged amendment of the Indictment and/or the incorrect and misleading response to the jury's question required reversal of the conviction? The plain error standard was improperly applied because: (a) the trial court announced its determination to omit the overt acts in the context of its decision denying Boyle's motion for acquittal under Rule 29 and Boyle's request that the trial court make a separate determination on the legal sufficiency of the alleged overt acts and the error was therefore preserved for appeal; (b) the transcript of the trial does not contain any reference to the jury question at issue or the trial court's answer to the jury question and thus the Panel improperly concluded that no timely objection was raised; and thus, the Opinion is not supported by the Record, and the panel set an impossible standard that the petitioner would have to show he would have been acquitted but for the error. (18a). Most importantly, the Panel's standard that the Petitioner had to show he would have been acquitted if a proper charge were given is an erroneous standard. *United States v. Olano*, 507 U.S. 725 (1993).

5. Because the errors committed by the trial court in this case clouded the most fundamental issue in a criminal case — the elements of the crime charged — these errors denied the petitioner a fair trial; therefore, his conviction should be reversed. This Opinion violates the basic legal principles set forth by this Court in *United States v. Stirone, supra, United States v. Miller,* 471 U.S. 130 (1985), *and Russell v. United States,* 369 U.S. 749 (1962).

## LIST OF PARTIES

Charles William Boyle, *Petitioner.*

Robert Eugene Smith, a co-defendant below, has not joined in this Petition.

## TABLE OF CONTENTS


| | *Page* |
|---|---|
| Questions Presented for Review | i |
| List of Parties | iii |
| Table of Contents | iv |
| Table of Citations | v |
| Opinions Below | 1 |
| Statement of Jurisdiction | 1 |
| Constitution, Statutes, and Rules Involved | 1 |
| Statement of the Case | 2 |
| Reasons for Granting the Writ | 12 |
| I. The Trial Court's Deletion Of All The Overt Acts From The Indictment and Its Response To The Jury Question Constituted A Constructive Amendment Of The Indictment And Per Se Reversible Error. | 12 |
| A. Amendment Of The Indictment Constitutes Per Se Reversible Error. | 12 |
| B. Deletion Of All Overt Acts And The Jury Charge Constituted An Amendment Of The Indictment. | 13 |

*Contents*


| | Page |
|---|---|
| C. The Amendment Mandates Reversal. ..... | 19 |
| II. The Trial Court's Response To The Jury's Question On The Overt Acts Mandates Reversal. ..... | 21 |
| A. The Answer Was Erroneous And Misleading. ..... | 21 |
| B. The Panel Erroneously Applied The Plain Error Standard Under Rule 52(b). ..... | 22 |
| Conclusion ..... | 24 |


## TABLE OF CITATIONS

**Cases Cited:**


*Russell v. United States*, 369 U.S. 749, 82 S. Ct. 1038, 8 L. Ed. 2d 240 (1962) ..... ii, 14

*Salinger v. United States*, 272 U.S. 542 (1926) ..... 15

*Stirone v. United States*, 361 U.S. 212 (1960) ..... i, ii, 14, 19, 23

*Thomas v. United States*, 398 F.2d 531 (5th Cir. 1967) ..... 15

*United States v. Aguilar*, 756 F.2d 1418 (9th Cir. 1985) ..... 16, 18

*Contents*

*Page*

*United States v. Artrip*, 942 F.2d 1568 (11th Cir. 1991) ..... 18

*United States v. Burnett*, 582 F.2d 436 (8th Cir. 1976) ..... 15

*United States v. Cancelliere*, 69 F.3d 1116 (11th Cir. 1995) ..... 18, 19, 20

*United States v. Carlock*, 806 F.2d 535 (5th Cir. 1986), *cert. denied*, 480 U.S. 949, *cert. denied*, 480 U.S. 950 (1987) ..... 16

*United States v. Combs*, 762 F.2d 1343 (9th Cir. 1985) ..... 17, 18

*United States v. Elliott*, 571 F.2d 880 (5th Cir. 1978) . 16

*United States v. Floresca*, 38 F.3d 706 (4th Cir. 1994) ..... 17, 19

*United States v. Ford*, 872 F.2d 1231 (6th Cir. 1989), *cert. denied*, 495 U.S. 918 (1990) .....16, 17, 18, 19, 20

*United States v. Gorman*, 807 F.2d 1299 (6th Cir. 1986) ..... 20

*United States v. Johnson*, 575 F.2d 1347 (5th Cir. 1978) ..... 16

*United States v. Leichtnam*, 948 F.2d 370 (7th Cir. 1991) ..... 17, 18

*Contents*


| | Page |
|---|---|
| *United States v. Leisure*, 844 F.2d 1346 (8th Cir.), *cert. denied*, 488 U.S. 932 (1988) | 17 |
| *United States v. Levine*, 41 F.3d 607 (10th Cir. 1994) | 17 |
| *United States v. Miller*, 471 U.S. 130 (1985) | 15 |
| *United States v. Olano*, 507 U.S. 725, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993) | ii, 23 |
| *United States v. Patino*, 962 F.2d 263 (2nd Cir.), *cert. denied*, 113 S. Ct. 354 (1992) | 19 |
| *United States v. Pazsini*, 703 F.2d 420 (9th Cir. 1983) | 20 |
| *United States v. Peel*, 837 F.2d 975 (11th Cir. 1988) | 17 |
| *United States v. Plenty Arrows*, 946 F.2d 62 (8th Cir. 1991) | 18 |
| *United States v. Salinas*. 654 F.2d 319 (5th Cir. 1981), *overruled in part en banc on other grounds, United States v. Adamson*, 700 F.2d 953 (5th Cir. 1983), *cert. denied*, 464 U.S. 833 (1983) | 12, 13 |
| *United States v. Stevens*, 38 F.3d 167 (5th Cir. 1994) | 21 |
| *United States v. Willoughby*, 27 F.3d 263 (7th Cir. 1944) | 17 |

*Contents*

*Page*

*United States v. Young*, 730 F.2d 221 (5th Cir. 1984) . 13

**Statutes Cited:**

18 U.S.C. § 371 ..... i, 9

18 U.S.C. § 1503 ..... 3, 11

18 U.S.C. § 1512 ..... 3, 11

18 U.S.C. § 1512(1) ..... 17

18 U.S.C. § 1512(3) ..... 17

18 U.S.C. § 1623 ..... 3, 11

28 U.S.C. § 1254 ..... 1

**United States Constitution Cited:**

First Amendment ..... 2

Fifth Amendment ..... 1, 14, 18, 23

Sixth Amendment ..... 2, 23

**Rules Cited:**

Federal Rule of Civil Procedure 29 ..... ii, 5, 8, 16, 20

Federal Rule of Civil Procedure 52(b) .... i, ii, 19, 20, 22, 23

*Contents*

*Page*

**Other Authority Cited:**

*Note, Appellate Review in a Criminal Case of Errors Made Below Not Properly Raised And Reversed,* 23 Miss. L.J. 42 (1951) ..... 23

**APPENDIX**

Appendix A — Order of the United States Court of Appeals for the Fifth Circuit, Filed October 9, 1996 ..... 1a

Appendix B — Opinion of the United States Court of Appeals for the Fifth Circuit Filed August 28, 1996 ..... 3a

Appendix C — Judgment of the United States District Court for the Southern District of Texas Entered July 24, 1995 ..... 31a

## OPINIONS BELOW

This case is reported at 96 F.3d 1444 (1996) in table case format and at 1995 U.S. App. Lexis 25169 in full text format.

## STATEMENT OF JURISDICTION

(i) The Fifth Circuit Court of Appeals issued its Opinion on August 28, 1996.

(ii) A timely Motion For Panel Rehearing and Motion for Rehearing *En Banc* was denied on October 9, 1996.

(iii) This Court has jurisdiction to review this petition pursuant to 28 U.S.C. § 1254.

## CONSTITUTION, STATUTES, AND RULES INVOLVED

The Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time or War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

## STATEMENT OF THE CASE

Petitioner Charles William Boyle is an attorney who, for 18 years, has lived and practiced law in Atlanta, Georgia. Boyle has been married for 14 years and has two young sons, ages 11 and 9. Prior to this case, Boyle had never been charged with any criminal conduct.

In 1985 and 1986, certain of Boyle's clients were the subjects of federal investigations into their business activities. Boyle believed the activities in question were protected by the First Amendment. At his clients request, Boyle represented his clients with regards to federal grand jury subpoenas directed to the clients. During this period Boyle reluctantly agreed to answer questions about his clients before a federal grand jury in Memphis. In April of 1991, a federal grand jury sitting in Houston issued a sealed 12-count criminal Indictment (R. 1-55) naming Boyle as one of eight defendants. While six of the defendants were identified as principal actors in an alleged criminal enterprise, Boyle and Robert Eugene Smith, attorneys

who represented the companies, were charged solely under Count 12 of the Indictment. (R. 18). Count 12 accused the two attorneys of conspiring with the principal defendants to conceal the identity of the owners of certain corporations in order to impede the government's investigation. (R. 17). Boyle's role in the alleged conspiracy was identified as "counseling" his clients on how and when to set up corporations, serving as the registered agent for several of these corporations, appearing on behalf of the corporations in response to grand jury subpoenas, and providing testimony to the grand juries. (R. 14-17).[1]

The Indictment contained a general allegations section and then set out 31 alleged "overt acts," (R. 10-13). With the exception of the assertion that Boyle testified falsely before the grand juries in Tennessee and Houston — assertions that were expressly rejected by the jury — and the claim that he "instructed" representatives of his clients to withhold information from the grand jury, the Indictment challenged only legitimate actions taken by Boyle *as a lawyer* for the principal targets of the government's investigation.

Immediately after the Indictment issued, Boyle filed a motion for a bill of particulars. (R. 186). On September 1, 1992, the trial court entered an Order requiring the government to file a bill of particulars to correct deficiencies in the Indictment. (R. 896). The trial court found:

---

1. In Count 12, the government alleged that Boyle conspired with the other defendants to violate three separate statutes: (1) 18 U.S.C. § 1512, prohibiting "knowingly engaging in misleading conduct" toward a witness before a federal grand jury; (2) 18 U.S.C. § 1503, prohibiting corruptly influencing, obstructing, or impeding the due administration of justice; and (3) 18 U.S.C. § 1623, prohibiting making a false material declaration before a grand jury. (R. 38). The jury acquitted Boyle of conspiring to make a false material declaration. (R. 1565-66).

> [T]he remaining concern of the Court is whether the Indictment sufficiently alleges the specific misleading conduct that violates §§ 1512(b)(A) and 371 and what specific false declarations made under oath that violates §§ 1503 and 371. In this regard, the *Court holds that fair notice of the conduct against which the defendants must defend or plead double jeopardy in a subsequent proceeding has not been given.*

(R. 896, at 889) (emphasis added).

The government filed its response to Boyle's request for a bill of particulars on September 18, 1992, (R. 1059), stating that it was not required to provide the information sought by Boyle. It then simply restated the general allegations in the Indictment, and stated that the government's charges were based upon "but not limited to" a laundry list of matters, including all of the overt acts. (*See, e.g.*, R. 1055.) At the trial, the government continued to rely on general attacks designed to blur the lines between a lawyer's lawful representation of a client and participation in a criminal conspiracy. The primary attack on Boyle by the government related to legal advice he gave Michael Cescon. The evidence at trial was, in part, that Cescon, an employee of one of the companies, was served with a subpoena decus tecum requesting certain documents and information, some of which Cescon did not possess. Cescon attempted to create a document to comply with the government's request. Cescon asked Boyle about the government's subpoena and Boyle advised Cescon to produce all the records he had in his possession and to make sure all information he provided was correct. Cescon provided all documents and all information which he had in his possession. (Tr. 1279-1280). Boyle attempted to cross examine Cescon, and another government witness Grod,

concerning critical statements made on direct examination, but was blocked by the trial court who threatened to jail the witnesses if they changed what they said on direct examination. The evidence contradicted many of the overt acts and showed that Boyle only incorporated one corporation, which corporation dealt in beauty products and not adult materials. Two judges and state and federal prosecutors testified as character witnesses for Boyle. (Tr. 1763-1784, 1803-1815).

At the conclusion of the evidence, Boyle made a Rule 29 motion for acquittal and a motion for judgment of acquittal outlining the lack of evidentiary support for the alleged overt acts. (R. 1562). The trial court refused to determine whether there was evidence to support each overt acts alleged in the Indictment, or whether each alleged act could reasonably be construed as an action in furtherance of the conspiracy. The trial court responded to counsel for Boyle's motion that if there was insufficient evidence as to all the overt acts alleged in the indictment that counsel had to go out "that night" and put Boyle's Rule 29 motion in writing. The following took place:

> *The Court*: I don't care how many there are.
>
> *Mr. Froelich*: And I think your honor has to rule on each of them, I think, as a matter of law.
>
> *The Court*: I don't think I have to rule on any of them as a matter of law. That's like me going through here trying to pick out which of these overt acts I should say is not applicable. And you know as well as I do that the jury can convict on the same — and be just as guilty on any one of those acts as if there were ten. It doesn't matter.

*Mr. Froelich*: But you cannot allow an overt act, your Honor, to go to the jury in which there's been no evidence. And there's a lot of those overt acts on which there has been no evidence. There is a lot of the alleged perjuries. Let me tell you the problem —

*The Court*: Well, Here's my point. I'm not sure that these overt acts have anything to do with the alleged perjury counts, but what I was simply doing and choosing as an example say, that I don't have to decide what the overt acts are or what the substantive — whether or not there is any substance to them or not, because the point is that it will not — if there is any one of them left, the same issue goes to the jury.

And I'm not going to sit up here and debate with you as to whether or not any of these particular overt acts should go to the jury or any particular perjury count ought to go to the jury. Period. I'm not going to do it.

*Mr. Froelich*: Your Honor, that's the whole point of why — what do we know now? There is nothing —

*The Court*: I will rule based upon objections to persons arguing outside of the record, but I am not going to sit up here and listen to the lawyers argue with me or to me about, "Well, Judge, you know they said this occurred and that was not true. You know they said this occurred during the grand jury.

> Let the jury decide. You know, you can argue to the jury, not to me.
>
> *Mr. Froelich:* Well, the problem is, your Honor, there are — as a matter of law, It should not even go to the jury.
>
> *The Court*: Well, if it shouldn't go to the jury, then you won't argue it, will you? And there is no evidence on it, and it's a violation to argue it, isn't it ?

(Tr. 1737-38). Later the trial court, confusing the petit jury with a grand jury, stated:

> The Court: *I will submit the indictment to the grand jury.* I am not going to submit special issues to the grand jury on whether or not on one or 77 occasions anybody committed perjury. *I am not going to do that, and I'm not going to spend my time dealing with whether or not there is any evidence on any one particular issue.*
>
> The purpose of the Bill of Particulars was to inform you of what the charges are. *If they haven't proved it on one or on 71, it's really not my concern,* because there are, by your count, six other that can be submitted, and that's the reason — it's going to go to the jury on guilty or not guilty, not on whether or not on five occasions any one of these defendants committed perjury.

(Tr. 1740) (emphasis added).

The next morning Boyle filed a written Rule 29 motion. (R. 1562). In denying Boyle's motion, the trial court stated that it intended to respond to Boyle's motion not by reviewing the evidence but by deleting all alleged "overt acts" from the Indictment:

> Relative to defendants having been joined in by Mr. Smith, motion for summary judgment of acquittal, it's the Court's opinion that motion should also be denied. First of all, the Court informed the defendants yesterday *that it was not going to submit to the jury any overt acts as part of the indictment.* So that part of the defendant's motion is moot. *Relative to the Court making findings as it relates to each of those overt acts, in my opinion, that would be inappropriate, because the case law suggests that the government doesn't have to prove any one or any particular number of overt acts.* But, simply, the overt acts, in my opinion, are more designed to apprise the defendant of what he is charged with or how they intend to try to prove guilt.
>
> And, therefore, for me to sort through, as this is some kind of Bill of Particulars, and excise out what I consider to be acts that have been proved seems to me to invade the province of the jury on the questions — on the general question of whether or not the defendants engaged in conduct that violates federal law.

(Tr. 1747-48) (emphasis added); *see also* Order on Motion to Supplement the Record (December 8, 1995) (trial court confirms

that all overt acts deleted from the Indictment). Most importantly, when counsel attempted to respond to the trial court he was ordered not to do so. (Tr. 1753).

During closing argument, the government took full advantage of the trial court's decision to delete the overt acts from the Indictment by arguing new and untrue allegations that were not included in either the original Indictment or the government's response to the bill of particulars and as to which there was no evidence at the trial, namely a claim that Boyle had appeared before a 1990 grand jury but had not produced subpoenaed documents. (Tr. 1988-89).[2] In fact, Boyle had produced the requested documents to the grand jury.

The trial court rejected Boyle's request charge containing the three elements of a § 371 conspiracy. The trial court then gave an extremely confused and disjointed charge to the jury. This charge, in part, included a definition of a conspiracy that included only two elements of the § 371, with no mention of an overt act as an element of the crime. (19a-20a). The trial court charged:

> 1) That two or more persons in some way or manner, positively or tacitly, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment; and
>
> 2) That the defendant knowingly or

---

2. On appeal, the government conceded that this claim was not part of the Indictment *and* that the claim was factually incorrect. While Boyle's counsel attempted to move for mistrial following the closing argument, the trial court would not allow the motion. (T. 2027). Boyle filed a written Motion for Mistrial addressing the issue shortly after the jury returned its verdict. (R. 1649).

> intentionally became a member of such conspiracy.

(Tr. 2065-66). After omitting this critical overt element of the charge, the trial court later went on to mix the overt act section of the indictment with the means and method section. The trial court charged the jury as follows:

> The Indictment alleges several means or methods by which the defendants are accused of violating the conspiracy statutes. However, the government is not required to prove all of them and or methods alleged in the indictment, and the government is required to prove only one overt act committed in furtherance of the conspiracy.
>
> It is essential that each juror must agree with each of the other jurors as to the specific statute or statues the defendants conspired to violate, assuming that you find that there is a conspiracy.

(Tr. 2069).

The trial court gave this confusing charge and then deleted all overt acts from the Indictment before submitting it to the jury.[3] The jury, faced with an Indictment stripped of all the alleged overt acts, immediately sent a Note to the trial court, inquiring specifically about the overt acts.

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3. The Indictment submitted to the jury also contained in the conspiracy a defraud of the government charge which was dismissed in the pretrial motions but was never deleted from the Indictment.

> Is the "Count twelve" the overt acts that we deliberate? If not what is Count twelve's purpose? Can we get 6 more copies of the Count 12?

The trial court responded to the jury's request as follows:

> The overt acts are those *set forth in the indictment* and arguments of the attorneys. Count 12 is the allegation of acts in violation of the various statutes set forth therein.

(R. 1637). *Id.* (emphasis added). The trial court's "answer was incorrect and confusing." (17a-18a). The trial court had deleted the overt acts from the Indictment *before* submitting it to the jury. Because all overt acts had been deleted from the indictment by the trial court, the trial court's response to the jury's questions made the general allegations in the Indictment overt acts. Thus, the trial court greatly expanded the Indictment. Moreover, in closing argument the government raised an entirely new claim against Boyle — a claim that on appeal the government conceded was not only new but also factually incorrect.

On November 9, 1992, the jury returned a verdict on the single count, finding Boyle guilty of the § 1512 and § 1503 conspiracy charges, but finding him *not* guilty of having conspired to give false testimony to the grand jury under § 1623. (R. 1566). While the jury indicated on the Special Jury Verdict Form that they "agree[d] unanimously on at least one specific overt act which was committed in furtherance of the conspiracy . . . ," (Special Jury Verdict Form, at 2, R. 1566), the jury did not identify any specific overt act or indicate whether such an overt act appeared in the Indictment. *Id.* Further, from what had preceded this verdict it is highly unlikely that the jury even knew what an overt act was, no less whether one had been committed in furtherance of the conspiracy.

On August 28, 1996, a panel of the United States Court of Appeals for the Fifth Circuit *issued an o*pinion affirming Boyle's conviction. On October 9, 1996, Petition for Rehearing *En Banc* was denied. It is from the above that Boyle petitions for a writ of certiorari.

## REASONS FOR GRANTING THE WRIT

### I.

### THE TRIAL COURT'S DELETION OF ALL THE OVERT ACTS FROM THE INDICTMENT AND ITS RESPONSE TO THE JURY QUESTION CONSTITUTED A CONSTRUCTIVE AMENDMENT OF THE INDICTMENT AND PER SE REVERSIBLE ERROR.

### A. Amendment Of The Indictment Constitutes Per Se Reversible Error.

Few principles of law are more firmly established than the rule that an indictment issued by a grand jury cannot be amended by the trial court in the course of a trial.

> Once the grand jury has spoken, the defendant goes to trial prepared to defend those charges, and the government is bound to prove the essential elements of the charges specified in the Indictment. *See United States v. Trexler*, 474 F.2d 369, 371 (5th Cir. 1973). The game's rules are fixed prior to the judge's charge to the jury.

*United States v. Salinas*, 654 F.2d 319, 324 (5th Cir. 1981) ("*Salinas II*"), *overruled in part en banc on other grounds,*

*United States v. Adamson*, 700 F.2d 953 (5th Cir. 1983), *cert. denied*, 464 U.S. 833 (1983).[4]

In the Opinion, the panel recognized that "[o]nce an indictment has been returned, its charge may not be broadened through amendment except by grand jury. *Stirone v. United States*, 361 U.S. 212 (1960); *United States v. Doucet*, 994 F.2d 169 (5th Cir. 1993); *United States v. Baytank*, 934 F.2d 599, 606 (1991)." (10a). Moreover, the panel quoted an earlier decision, *United States v. Young*, 730 F.2d 221, 223 (5th Cir. 1984), where the circuit embraced the "accepted test . . . that a constructive amendment of the indictment occurs when the jury is permitted to convict the defendant upon a factual basis that effectively modifies an essential element of the offense charged. *In such cases, reversal is automatic* because the defendant may have been convicted on a ground not charged in the indictment." (10a-11a) (emphasis added). While the panel recognized this principle of law, it failed to apply the principle to the undisputed facts in this case.

**B. Deletion Of All Overt Acts And The Jury Charge Constituted An Amendment Of The Indictment.**

It is undisputed that the trial court took the totally unprecedented step in this case of deleting all overt acts, an essential element of the crime, from the Indictment before submitting it to the jury. To the best of Boyle's knowledge, no appellate decision of any other federal court has condoned such an action. Thus, this appeal presents a substantial issue of first impression.

---

4. Critically, the factor that influenced the determination in *Salinas II* that the Indictment had been impermissibly amended was the conclusion that the trial court, through its instructions to the jury, had impermissibly expanded the indictment to include matters not named in the Indictment. The same thing happened here through the submission of the altered Indictment and the trial court's response to the jury's question.

The Panel Opinion, in addressing whether the deletion of the overt acts constituted an amendment of the Indictment, stated that "we cannot say that providing the jury with a copy of the indictment and redacting the overt acts was plainly an act of constructive amendment." (12a). Boyle submits that, in fact, the Indictment was clearly amended and that the amendment mandates reversal.

Initially, this Court should determine whether the deletion of all of the overt acts alone constituted an amendment of the Indictment. An amendment occurs when the court either literally or constructively alters the charging terms of the indictment after it has been returned by the grand jury. The Court in *Stirone v. United States*, 361 U.S. 212, 217-119 (1960) found that an amendment of an indictment violates the Fifth Amendment Grand Jury Clause.

Boyle submits that in this case there is no doubt that the omission of the overt acts broadens the indictment. Perhaps the most compelling proof of this fact is that, after all of the overt acts were deleted, the Indictment that was submitted to the jury could not pass muster as a valid conspiracy indictment. Long-standing law states that a conspiracy indictment must include all elements of the offense charged *and* must list overt acts which the government alleges were committed in furtherance of the conspiracy. *Russell v. United States*, 369 U.S. 749, 763-64, 82 S. Ct. 1038, 1046, 8 L. Ed. 2d 240 (1962). Here, the Indictment submitted to the jury lacked an essential element, it contained *no* overt acts and, thus, was not an acceptable indictment. Further, in the form in which it was submitted to the jury it was confusing and misleading in that it implied that the general allegation section of the Indictment was the overt acts.

The Panel Opinion seeks to defend the trial court's actions by stating that the trial court was not required to submit the

Indictment to the jury and that the decision whether to do so rests within the trial court's discretion. (12a). This may be a correct statement of law, but misses the point of the appeal altogether. Regardless of whether the trial court's was *required* to submit the Indictment to the jury, once it elected to do so in the exercise of its discretion, it could not submit only a partial indictment, that lacked an essential element of the crime, to the jury.

The trial court's action in deleting all overt acts clearly cannot be defended as a variance rather than an amendment of the Indictment. Deleting all of the overt acts clearly had the effect of broadening the basis by allowing the jury to convict on the broad general allegations remaining in the indictment, rather than the specific overt acts found by the grand jury, and, thereby, constituted an amendment. Under established law, in order to be valid a deletion from an indictment must have the effect of *narrowing* the charges or the grounds upon which the defendant may be convicted. *United States v. Miller*, 471 U.S. 130, 144 (1985). Here, had the trial court submitted the actual Indictment, the jury's analysis would have been focused on the overt acts alleged.[5] By removing *all* overt acts, the trial court provided the jury with an indictment that contained only broad generalized statements and no specific overt acts. If none of the overt acts was supported by the evidence and law, as alleged by Boyle in

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5. Boyle agrees that the trial court can remove a specific overt act from an indictment as "surplusage" when there is no basis for the overt act to be submitted to the jury, provided that after the deletion the trial court determines that (i) the indictment as so narrowed continues to state a complete criminal offense, and (ii) that offense is contained in the indictment is as originally returned. *See Salinger v. United States*, 272 U.S. 542, 548-49 (1926); *Thomas v. United States*, 398 F.2d 531 (5th Cir. 1967); *United States v. Burnett*, 582 F.2d 436, 438 (8th Cir. 1976). Eliminating such "unproven acts" from the indictment narrows the indictment.

his Rule 29 motion, the Indictment should have been dismissed.[6] If the trial court concluded that some limited number of the overt acts were supported by the law and the evidence, the Indictment should have been limited to those acts. By deleting all overt acts and then submitting the Indictment containing many general allegations to the jury for application of its unfettered discretion the trial court certainly did not narrow the bases upon which the jury could convict. Thus, the trial court's action is not consistent with the standard embraced in *Miller.* The Petitioner could find no case wherein a trial court submitted an indictment to a jury after it had removed an essential element of the charge from the indictment.

Petitioner's position is that the removal of the overt act was an impermissible amendment. If that deletion alone were not sufficient to show an amendment, clearly this removal together with the charge given to the jury in response to its question amended the indictment. A constructive amendment occurs when the jury instruction broadens the scope of the indictment. *United States v. Aguilar,* 756 F.2d 1418, 1423 (9th Cir.); *United States*

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6. The panel suggests that deletion of the overt acts in their entirety may not have been plain error. (11a). However, the cases cited by the panel stand only for the proposition that the introduction into evidence of overt acts other than ones alleged in the indictment is not necessarily error. *United States v. Carlock*, 806 F.2d 535, 550 (5th Cir. 1986), *cert. denied*, 480 U.S. 949, and *cert. denied*, 480 U.S. 950 (1987)("Carlock, Sr.'s argument that the indictment was enlarged by evidence that equipment was sabotaged is without merit. Such acts are implicit in the extortion counts and are evidentiary detail which need not be spelled out in the indictment."); *United States v. Johnson*, 575 F.2d 1347, 1357 (5th Cir. 1978) (holding that there was no variance between a bill of particulars and the proof at trial); *United States v. Elliott*, 571 F.2d 880, 911 (5th Cir. 1978) ("the government is not limited to overt acts pleaded in the indictment in proving a conspiracy"). None of these cases even remotely stands for the proposition that all overt acts can be stripped from the indictment without the indictment being amended.

*v. Ford*, 872 F.2d 1231, 1236-37 (6th Cir. 1989), *cert. denied*, 495 U.S. 981 (1990); *United States v. Leichtman*, 948 F.2d 370, 379-81 (7th Cir. 1991); *United States v. Combs*, 762 F.2d 1343, 1346 (9th Cir. 1985).

The following cases clearly support the Petitioner's position: *United States v. Leisure*, 844 F.2d 1347, 1365 (8th Cir.) (conviction reversed when trial court instructed jury on elements of statutory offense different from that for which the defendant was indicted), *cert.denied*, 488 U.S. 932 (1988); *United States v. Levine*, 41 F.3d 607, 617 (10th Cir. 1994) (conviction reversed when indictment for tampering with consumer product charged impact on interstate commerce and jury instructed that product's travel in interstate commerce was sufficient to sustain conviction); *United States v. Peel*, 837 F.2d 975, 976-77 (11th Cir. 1988) (conviction reversed with statute required proof that defendant was on board a vessel of the United States or subject to its jurisdiction but jury instruction allowed conviction if "defendant was a citizen of the United States on board any vessel"); *United States v. Floresca*, 38 F.3d 706, 709 (4th Cir. 1994) (constructive amendment when indictment charged violation of 18 U.S.C. § 1512(1) and jury instructions related to § 1512(3)); *United States v. Willoughby*, 27 F.3d 263, 266 (7th Cir. 1944) (constructive amendment when indictment charged use of firearm during drug distribution and proof at trial showed that gun used while intend to distribute not during actual distribution); *United States v. Floresca*, 38 F.3d 706, 1710 (4th Cir. 1994) (constructive amendment when indictment charged defendant with violation of specific provision of witness tapering statute and court's instruction allowed conviction under different provision of statute); *United States v. Ford*, 872 F.2d 1231, 1236-37 (6th Cir. 1989) (constructive amendment when indictment charged defendant with unlawful possession of firearm on a certain date and court's instruction to jury allowed conviction if defendant unlawfully possessed firearm at any time within 11-

month period), *cert.denied*, 495 U.S. 918 (1990); *United States v. Leichtnam*, 948 F.2d 370, 279-81 (7th Cir. 1991) (constructive amendment when indictment charged commission of crime using a Mossberg riffle and court's instruction to jury allowed conviction for commission of crime using "a firearm" and there was evidence of three different firearms); *United States v. Combs*, 762 F.2d 1343, 1346 (9th Cir. 1985) (constructive amendment when indictment charged illegal possession of gun and court's instruction to jury allowed conviction for possession of sawed-off shotgun, broadening basis of conviction); *United States v. Artrip*, 942 F.2d 1568, 1569-71 (11th Cir. 1991) (constructive amendment when indictment charging false financial statements did not list nondisclosure of liabilities as reason for falsity, evidence of the undisclosed liabilities introduced on conspiracy count, and trial court failed to instruct jury that evidence of undisclosed liabilities could not be considered by jury on count involving false financial statements); *United States v. Plenty Arrows*, 946 F.2d 62, 65-66 (8th Cir. 1991) (variance between date alleged in indictment and proof offered fatal because evidence only showed act occurred in period beginning before date of indictment but extending past date of indictment, and *United States v. Aguilar*, 756 F.2d 1418, 1423 (9th Cir. 1985) (substantive amendment of indictment, "particularly if the amendment broadens of alters the offense charged," fatal error because violates defendant's Fifth Amendment right to be tried only on charges brought by grand jury indictment).

The Eleventh Circuit's decision in *United States v. Cancelliere*, 69 F.3d 1116 (11th Cir. 1995), dramatically demonstrates the diligence with which any deletion of material from an indictment must be scrutinized. In *Cancelliere*, the government had charged the defendant with "knowingly and willfully" committing the offense of money laundering. 69 F.3d at 1120. At the close of the evidence, the government moved to

strike the word "willfully" and the trial court granted the motion. *Id.* Despite the fact that the statute did not require a showing of willfulness, the Eleventh Circuit held that redacting the word "willfully" from the indictment impermissibly broadened the indictment. The redaction, as did the one in this case, came at the end of the case and after the defendant had introduced evidence.

In this case we not only have a redaction, but also an erroneous and misleading charge to the jury in response to its question and the government's improper and erroneous expansion of the charge in closing argument.

**C. The Amendment Mandates Reversal.**

The Panel suggests that even if there was an amendment, it would not constitute plain error under Rule 52(b). (12a). The Panel's conclusion in this regard flies in the face of controlling precedent.

First, this Court has always held that an amendment of an indictment constitutes *per se* reversible error. As the Court found in *Stirone:*

> Deprivation of such a basic right is far to serious to be treated as nothing more than a variance and then dismissed as harmless error.

361 U.S. at 217, 80 S. Ct. at 273

*See also United States v. Floresca*, 38 F.2d 3rd 706, 711 (4th Cir. 1996); *United States v. Patino*, 962 F.2d 263, 265-266 (2nd Cir.), *cert. denied,* 113 S. Ct. 354 (1992); *United States v. Ford*, 872 F.2d 1231, 1235 (6th Cir. 1989) *cert. denied,* 495 U.S.

918 (1990); *United States v. Pazsini*, 703 F.2d 420, 422-24 (9th Cir. 1983); *United States v. Gorman*, 807 F.2d 1299, 1305 (6th Cir. 1986).

In *United States v. Cancelliere*, *supra* at 1121, the Eleventh Circuit reaffirmed that "a fundamental principle stemming from the [fifth] amendment is that a defendant can only be convicted for a crime charged in the indictment. Per se reversible error occurs 'when the essential elements of the offense are altered to broaden the possible bases for conviction beyond what is contained in the indictment.' " Thus, as a matter of law, an amendment of the indictment meets the legal standard of plain error under Rule 52(b), *i.e.*, an error that affects substantial rights.

In short, if the Indictment was amended, and the facts above clearly establishes that it was, the plain error standard is automatically met. Moreover, the Panel is incorrect in its suggestion that the trial court's error in amending the Indictment was not preserved for appeal. The trial court announced its decision to delete the overt acts in the context of Boyle's motion for acquittal under Rule 29 complaining the government failed to prove any of the overt acts. The trial court denied the motion, and expressed its intent to delete the overt act rather than reviewing the government's evidence. This is clear from the transcript:

> Relative to defendants having been joined in by Mr. Smith, motion for summary judgment of acquittal, it's the Court's opinion that motion should also be denied. First of all, the Court informed the defendants yesterday *that it was not going to submit to the jury any overt acts as part of the indictment.* So that part of the defendant's motion is moot.

> *Relative to the Court making findings as it relates to each of those overt acts, in my opinion, that would be inappropriate, because the case law suggests that the government doesn't have to prove any one or any particular number of overt acts.* But, simply, the overt acts, in my opinion, are more designed to apprise the defendant of what he is charged with or how they intend to try to prove guilt.

(Tr. 1747-48) (emphasis added). Further, the trial court told counsel not to respond. The implication of the Panel's holding is that Boyle, having filed motions seeking specific relief, was required to except separately to the trial court's rulings denying those motions in order to preserve the error of those rulings. There is no such requirement in the Rules of Criminal Procedure.

## II.

## THE TRIAL COURT'S RESPONSE TO THE JURY'S QUESTION ON THE OVERT ACTS MANDATES REVERSAL.

### A. The Answer Was Erroneous And Misleading.

The Panel correctly determined that the trial court's response to the jury question regarding the overt acts at issue in the case was error. The Panel recognized that, under a standard set in *United States v. Stevens*, 38 F.3d 167, 169-70 (5th Cir. 1994), "[w]hen a deliberating jury expresses confusion and difficulty, the court must clear that confusion away with 'concrete accuracy.' " (15a-16a). Applying that standard here, the Panel held:

> In the case at bar, the answer called for was

> more than "yes" or "no," and the court's answer was incorrect and confusing. The court referred the jury to the indictment for the overt acts, even though the court had redacted the overt acts from the indictment given to the jury. The court referred the jury to the closing argument, which while discussing various acts, did not label them "overt acts."

(17a-18a).

So, in this case, there is not only a misleading and erroneous answer to a critical question posed by the jury, but also an initially confusing charge and an indictment submitted to the jury from which the trial court had removed a critical and essential element of the charged offense. Clearly, the above constructively amended the indictment which effected fundamental rights of the petitioner and his conviction must not be allowed to stand under these circumstances.

**B. The Panel Erroneously Applied The Plain Error Standard Under Rule 52(b).**

Having concluded that the trial court's omitted an element of the conspiracy charge, deleted all overt acts from the indictment, and gave an erroneous and confusing answer to the jury's question, the Panel focused on whether these errors mandated reversal. The Panel concluded that reversal was not necessary because, based on its interpretation of the record, the defendants did not object to the trial court's answer to the jury and, thus, the errors did not rise to the level of plain error. The Panel's conclusion is incorrect for several reasons.

First, and most importantly, there is no evidence in the

Record of this case that Boyle was ever given notice of the jury's question or the trial court's response thereto.

Second, the trial court's erroneous response affected a substantial right of Boyle to a fair trial and, thus, constituted plain error under Federal Rule of Criminal Procedure 52(b). Boyle recognizes that, in order to constitute plain error, an error must affect substantial rights. This Court has previously held that a defendant's substantial rights include the right to be tried only on the charges framed by an indictment returned by a grand jury. *Stirone v. United States*, *supra* at 217. Because the trial court's response to the question broaden the charge and directed the jury to an indictment substantially different from which was issued by the grand jury, Boyle's substantial rights under the Fifth and Sixth Amendments were clearly affected. Further, the trial court initial instructions were confusing and the government made an erroneous argument to the jury.

Third, the panel's decision that this erroneous response to the jury's question does not require reversal appears to turn on the view that, in the absence of an express objection, the defendant cannot prevail unless he proves that the jury would have returned a verdict of acquittal if the trial court had provided a correct answer to the question. (18a-19a). This standard would impose an impossible burden, and is not supported by this Court's decision in *United States v. Olano*, 507 U.S. 725, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993). *Olano* provides that an error affects substantial rights within the meaning of Rule 52(b) if the error is "prejudicial" and suggests that an error should be viewed as prejudicial if "it probably influenced the verdict. . . ." 507 U.S. at 735 (quoting from *Note, Appellate Review in a Criminal Case of Errors Made Below Not Properly Raised and Reserved*, 23 Miss. L.J. 42, 57 (1951)). Further, under Rule 52(b) the government bears the burden to show no prejudicial impact on the jury's verdict.

Here, the trial court gave a confusing charge, deleted an essential element from the Indictment and provided an erroneous response to the jury's question, which question displayed the confusion the jury had on an issue of fundamental importance in a criminal case, an element of the charge that the government was required to prove and which the trial court had deleted from the Indictment. In effect the trial court actions denied the Petitioner the right to make effective arguments in his defense because he did not know against what overt acts he had to defend. Under these facts, there is no doubt that the improper response "influenced" the verdict and, thus, must be viewed as prejudicial.

## CONCLUSION

Based on the trial court's actions in this case the Petitioner's conviction must be reversed. Most importantly, the Opinion is this case is contrary to the law of this Court and numerous circuit courts. The Opinion effects fundamental rights of defendants to be tried on charges returned by a grand jury. Further, it is contrary to the harmless error standard set by this Court.

Respectfully submitted,

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**APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED OCTOBER 9, 1996**

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 95-20532

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

CHARLES WILLIAM BOYLE AND ROBERT EUGENE SMITH

Defendants-Appellants

Appeals from the United States District Court for the Southern District of Texas, Houston

ON SUGGESTIONS FOR REHEARING EN BANC

Before KING, JONES and SMITH, Circuit Judges.

PER CURIAM:

(x) Treating the Suggestions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FRAP and Local Rule 35), the Suggestions for Rehearing En Banc are DENIED.

*Appendix A*

* * *

ENTERED FOR THE COURT:

s/ Jerry E. Smith
JERRY E. SMITH
UNITED STATES CIRCUIT JUDGE

## APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED AUGUST 28, 1996

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 95-20532

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

CHARLES WILLIAM BOYLE AND ROBERT EUGENE SMITH,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(91-CR-50-7 & 91-CR-50-6)

Before KING, JONES, and SMITH, Circuit Judges.

PER CURIAM*:

Charles Boyle and Robert Smith were convicted of conspiring to obstruct a grand jury investigation and to mislead a person into withholding evidence from a grand jury, in violation of 18 U.S.C. §§ 371, 1503, and 1512. Smith was also convicted of conspiring to give false testimony to a grand jury, in violation of 18 U.S.C. § 1623. We affirm.

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

*Appendix B*

I.

A.

Boyle and Smith were attorneys for Linda Ivey,[1] a distributor of sexually explicit materials who owns a network of adult bookstores in several states. Smith helped Ivey establish an elaborate corporate structure for the management of her stores; Boyle represented Ivey in various legal matters.

In 1985, a grand jury in Tennessee was investigating possible violations of 18 U.S C. § 1462, which bars the interstate transportation of obscene materials. The grand jury subpoenaed the custodian of records of four bookstores in Memphis, seeking information about thirty-six videotapes. On May 15, 1985, Boyle appeared before the grand jury. He testified that he was appearing at Smith's request, that he was a representative of Praxis Management and the corporate owners of the four bookstores, and that the documents came from Praxis, a corporation that had physical possession of the bookstores' records. He denied that Praxis was a management corporation for the stores.

In 1986, the grand jury issued a subpoena to Praxis. On June 26, 1986, Boyle again appeared, at Smith's request, as custodian of records for Praxis.[2] He testified that some records

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1. Linda Ivey has been referred to in the record as "Mary Jane Jenkins" and "Lydia Entratter." We refer to her as Linda Ivey.

2. In the interim, Smith had modified the corporate structures so that Phoenix Management succeeded Praxis. According to the government, everything but the name of the corporation stayed the same.

were missing because Praxis no longer existed and the company had returned the records to its customers. Boyle also qualified his testimony by stating that his knowledge of Praxis came from conversations with Smith. Contradicting his earlier testimony, Boyle testified that Praxis had managed the bookstores.

Smith also testified before the grand jury, stating that Phoenix, which had replaced Praxis, provided bookkeeping services to various entities. He claimed that former Praxis personnel were not working for Phoenix. He denied that he was involved in the formation of Phoenix, that Phoenix and Praxis were the same companies, and that he knew who Phoenix's officers were.

In 1991, a federal grand jury in Houston issued subpoenas to Phoenix and other Ivey corporations, seeking account numbers and information regarding numerous accounts maintained by the target institutions. The subpoena was specifically limited to accounts with banks or financial institutions.

Michael Cescon, Phoenix's comptroller, consulted Boyle and asked for account numbers for some offshore accounts. Boyle knew the missing account numbers but did not provide them. Instead, he told Cescon that "there wasn't any account numbers and just insert 'N/A' in its place." Boyle also informed Cescon that the offshore accounts were outside the scope of the subpoena when he told Cescon that he was not certain that the accounts were with banks or financial institutions.

*Appendix B*

B.

On April 9, 1991, the appellants and six other defendants were charged in an indictment arising out of the grand jury investigations. Count 12 charged them with conspiring to obstruct grand jury investigations.[3] The six other defendants were charged with racketeering and obscenity offenses.

The appellants initially were charged with (1) knowingly engaging in misleading conduct toward a witness in a federal grand jury to cause and induce the witness to withhold testimony, records, and/or documents from the grand jury in violation of 18 U.S.C. § 1512(b)(2)(A); (2) corruptly influencing, obstructing, impeding or attempting to influence, obstruct, or impede the administration of justice in violation of 18 U.S.C. § 1503; and (3) knowingly making a false material declaration before a grand jury in violation of 18 U.S.C. § 1623(a). The indictment included thirty-one overt acts in furtherance of the alleged conspiracies and a charge of conspiracy to defraud the United States in violation of 18 U.S.C. § 371.[4] The government withdrew the § 371 charge.

The appellants challenged the sufficiency of count 12, and the court ordered a bill of particulars. The government responded, and the defendants renewed their motion to dismiss count 12, or in the alternative to compel additional answers to the bill of particulars. The court denied both motions.

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3. The district court severed count 12 on the appellants' motion.

4. This portion of count 12 is sometimes referred to as "paragraph 3."

*Appendix B*

Following a jury trial, Boyle and Smith were convicted, under § 371, of conspiring to obstruct justice (18 U.S.C. § 1503) and to mislead a person into withholding evidence from a grand jury (18 U.S.C. § 1512). Smith was also convicted, as part of the same count, of conspiring to give false testimony to a grand jury (18 U.S.C. § 1623).

II.

The defendants contend that the indictment failed adequately to apprise them of the conspiracy offenses with which they were charged. Their specific complaint is that the indictment and the bill of particulars failed to describe how they actually had violated the underlying substantive offenses. They assert that the bill of particulars was insufficient because it listed seventy-eight instances of false, incomplete, or misleading testimony without explaining why the testimony was false.

We review the sufficiency of the indictment *de novo*. *United States v. Flores*, 63 F.3d 1342, 1360 (5th Cir. 1995), *petition for cert. filed* (Mar. 14, 1996) (No. 95-8346). An indictment is sufficient if it (1) enumerates each prima facie element of the charged offense, (2) notifies the defendant of the charges filed; and (3) provides him with a double jeopardy defense against future prosecution. *Id.*

A conspiracy indictment is sufficient if it sets out an unlawful agreement and the commission of at least one overt act by at least one of the conspirators. The conspiracy, rather than the accomplishment of its underlying objectives, is the gravamen of the offense, so it is not necessary that the object of the conspiracy be described in the detail that would be required to charge a violation of the substantive offense. *United States*

*v. Ivey*, 949 F.2d 759, 765 (5th Cir. 1991), *cert. denied*, 506 U.S. 819 (1992); *United States v. Evans*, 572 F.2d 455, 483 (5th Cir.), *cert. denied*, 439 U.S. 870 (1978).

Count 12 was sufficient to provide the defendants with notice of the charges against them. They were not entitled to an indictment that provided a breakdown of how they violated each substantive crime or the evidence the government intended to produce. *Ivey*, 949 F.2d at 765; *United States v. Gordon*, 780 F.2d 1165, 1172 (5th Cir. 1986) ("Moreover, a defendant's constitutional *right* to know the offense with which he is charged must be distinguished from a defendant's *need* to know the evidentiary details establishing the facts of such offense, which can be provided through a motion for a bill of particulars."). The indictment alleged a conspiracy to commit three substantive crimes; it generally described an agreement between the defendants to conceal the identities of the true owners of the obscene bookstores; it contained a description of the various grand jury investigations and a general account of the conspiracy's goal to withhold specific information from the investigators; and it contained thirty-one overt acts, including allegations that Boyle and Smith testified falsely or instructed others to do so.

The defendants failed to demonstrate that the district court abused its discretion in denying their motion for further elaboration on the bill of particulars. *See United States v. Johnson*, 575 F.2d 1347, 1357 (5th Cir. 1978), *cert. denied*, 440 U.S. 907 (1979). Like their challenge to the sufficiency of the indictment, the challenge to the bill of particulars is based on a claim that the government did not adequately explain how their actions violated the substantive crimes they are accused of conspiring to violate. Without more, the defendants have failed

to show that the district court abused its discretion in denying their request for further elaboration.

III.

We also reject the defendants' closely related argument that they were denied their Sixth Amendment right to a unanimous verdict because the indictment included multiple alleged conspiracy offenses in a single count. It is settled law in this circuit that "[t]he allegation in a single count of a conspiracy to commit several crimes is not duplicitous, for '[t]he conspiracy is the crime, and that is one, however diverse its objects.' " *United States v. Cooper,* 966 F.2d 936, 939 (5th Cir.) (quoting *Braverman v. United States,* 317 U.S. 49, 54 (1942)), *cert. denied,* 506 U.S. 980 (1992).

Count 12 alleged one conspiracy, a conspiracy to obstruct grand jury investigations of Ivey's illicit activities. That the conspiracy entailed more than one crime does not turn a single conspiracy into multiple conspiracies. *Id* . To that extent, cases cited by the defendants are distinguishable. *See, e.g., United States v. Gordon,* 844 F.2d 1397, 1401 (9th Cir. 1988) (finding that the count was duplicitous because it charged two distinct conspiracies, one to defraud the United States Navy and a second to obstruct a grand jury investigation of the fraud).

IV.

The defendants contend that various acts by the court and the government impermissible amended the indictment. They assert three instances of constructive amendment. The first involves the bill of particulars. The defendants argue that the bill of particulars included two allegations that were not included

in the indictment. The second instance involves the redaction of the overt acts from the indictment. The defendants argue that the removal of the overt acts, in combination with the government's closing remarks, the court's instructions regarding overt acts, and the court's response to the jury's question resulted in a conviction premised on overt acts that were not alleged in the indictment. The third instance involves the submission of paragraph three of the indictment, which had been dismissed, to the jury.

Once an indictment has been returned, its charge may not be broadened through amendment except by grand jury. *Stirone v. United States,* 361 U.S. 212 (1960); *United States v. Doucet,* 994 F.2d 169, 172 (5th Cir. 1993); *United States v. Baytank,* 934 F.2d 599, 606 (1991). As we recognized in *United States v. Young,* 730 F.2d 221, 223 (5th Cir. 1984):

> *Stirone* requires the courts distinguish between constructive amendments of the indictment, which are reversible *per se,* and variances between indictment and proof, which are evaluated under the harmless error doctrine. The accepted test is that a constructive amendment of the indictment occurs when the jury is permitted to convict the defendant upon a factual basis that effectively modifies an essential element of the offense charged. In such cases, reversal is automatic, because the defendant may have been convicted on a ground not charged in the indictment. If, on the other hand, the variation between proof and indictment does not effectively modify an essential element

> of the offense charged, "the trial court's refusal to restrict the jury charge to the words of the indictment is merely another of the flaws in trial that mar its perfection but do not prejudice the defendant." [Citations omitted.]

The defendants have failed to prove that the bill of particulars constructively amended the indictment. The original indictment charged a conspiracy to commit three felonies, one of which was corruptly to influence, obstruct, and impede the due administration of justice. In response to the request for more particularized facts, the government included allegations that the defendants' conspiratorial objectives included presenting incomplete testimony and incomplete facts to the jury. The governments response did not add a new charge, but rather provided particularized examples of the type of conduct the defendants were charged with conspiring to commit.

We also find no reversible error in the second class of alleged constructive amendments. The defendants' basic argument is that redaction of the overt acts opened the door to a conviction based on overt acts that were not alleged in the indictment. The prosecutor's closing arguments, the court's jury charge, and the court's response to the jury question are the only instances as to which redaction of the overt acts could have resulted in the alleged expansion of the indictment.

The defendants failed to object to the redaction of the overt acts, so we review for plain error. *See United States v. Calverley,* 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc), *cert. denied,* 115 S. Ct. 1266 (1995). The alleged errors, if they were errors, were not plain at the time of trial.

*Appendix B*

A court is not required to submit the indictment to the jury; the decision to do so is within its broad discretion. *United States v. Haynes*, 573 F.2d 236, 241 (5th Cir.), *cert. denied*, 439 U.S. 850 (1978). Moreover, a conviction may be based on an overt act that is not pled as part of the conspiracy if the overt act is one that occurs during the life of the conspiracy charged.[5]

Given this caselaw, we cannot say that providing the jury with a copy of the indictment and redacting the overt acts was plainly an act of constructive amendment. Nor can we say that the court committed plain error when it allowed for the possibility that the defendants would be convicted on overt acts that occurred during the life of the conspiracy but were not listed in the indictment. Even assuming error, we do not find that allowing the convictions to stand would seriously affect the fairness, integrity, or public reputation of judicial proceedings.

We also reject the argument that submitting paragraph three to the jury constructively amended the indictment. The defendants have conceded that they failed to object to the submission of paragraph three. The court's clerical error does not seriously affect the fairness, integrity, or public reputation of judicial proceedings. *See Calverley*, 37 F.3d at 162-64.

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5. *United States v. Carlock*, 806 F.2d 535, 550 (5th Cir. 1986) (holding that the government is not limited to the overt acts pleaded in proving a conspiracy, but may rely on other overt acts of the conspirators during the life of the conspiracy), *cert. denied*, 480 U.S. 949, and *cert. denied*, 480 U.S. 950 (1987); *Johnson*, 575 F.2d at 1357 (recognizing the rule that a prejudicial variance does not occur when the government relies on overt acts other than those alleged in the indictment or bill of particulars); *United States v. Elliott*, 571 F.2d 880, 911 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978); *United States v. Perez*, 489 F.2d 51, 70 (5th Cir.), *cert. denied*, 417 U.S. 945 (1974).

*Appendix B*

V.

The defendants next argue that the district court denied them a fair trial by intimidating Andrew Grod and Michael Cescon into giving damaging testimony and by limiting cross examination of the two witnesses. We discuss each alleged error in turn.

A.

When a defendant asserts judicial misconduct, our role

> is to determine whether the [district court's] behavior was so prejudicial that it denied the defendant a fair, as opposed to a perfect, trial. To rise to the level of constitutional error, the district [court's] actions, viewed as a whole, must amount to an intervention that could have led the jury to a predisposition of guilt by improperly confusing the functions of judge and prosecutor. The [court's] intervention in the proceedings must be quantitatively and qualitatively substantial to meet this test.

*United States v. Bermea,* 30 F.3d 1539, 1569 (5th Cir. 1994) (citations omitted), *cert. denied,* 115 S. Ct. 113, *and cert. denied,* 115 S. Ct. 1825 (1995). *See also Flores,* 63 F.3d at 1360). The court's statements to Grod did not substantially lead to a predisposition of guilt by the jury. The statements took place outside the presence of the jury, limiting any prejudice. *United States v. Samak,* 7 F.3d 1196 (5th Cir. 1993) (per curiam) (noting that comments made outside the presence of the jury

could not lead to a predisposition of guilt by the jury).

The defendants' real complaint is that the court's intervention led to the damaging testimony. A court is allowed to admonish a witness who is evasive, however. Absent evidence that the court's comments caused Grod to lie on the stand, the defendants cannot complain of prejudice when the court simply instructed a witness to provide concise and responsive testimony.

B.

Defendants also complain that the court limited cross-examination of Grod and Cescon. We review rulings on the admissibility of evidence and restrictions on the scope of cross examination for abuse of discretion. *United States v. Crawford,* 52 F.3d 1303, 1307 (5th Cir. 1995).

The court did not abuse its discretion by allowing Grod to testify about foreign bank accounts. The status of the offshore accounts was relevant to the charge that Boyle had misled Grod by advising him that the accounts were not bank accounts. Grod, an accountant who previously had testified that the offshore accounts were bank accounts, was qualified to give opinion testimony regarding what types of financial institutions controlled the offshore accounts. Moreover, the court was within its discretion in refusing to allow Boyle's attorney to explain Grod's testimony; the attorney's statements were not evidence and were best left for closing argument.

The court did not abuse its discretion by limiting the cross-examination of Cescon. On direct examination, Cescon testified that he did not know why funds from Ivey's offshore accounts had passed through Bankers Trust Company. On cross, Boyle's

attorney made a bald-faced attempt to change Cescon's answer by attempting to elicit an affirmative answer to an explanation of why the funds had passed through Bankers Trust. The court, outside the presence of the jury, advised Boyle's attorney that he could not testify on behalf of Cescon and that Cescon would be perjuring himself if he changed his answer. None of the court's actions could be viewed as an abuse of discretion. *See Delaware v. Van Arsdall,* 475 U. S . 673, 679 (1985) .

VI.

A.

The defendants argue that the district court erred in its response to a note sent by the jury during its deliberations. The jury asked, "Is the 'Count Twelve' the overt acts that we deliberate. If not what is 'Count Twelve's' purpose. Can we get 6 more copies of the Count 12." The court responded, "The overt acts are those set forth in the indictment and arguments of the attorneys. Count 12 is the allegation of acts in violation of the various statutes set forth therein."

The jury made no request for elaboration. The defendants contend that the question demonstrated the jury's confusion over the overt acts and that the court's answer furthered that confusion by referring the jury to count 12, which did not describe any overt acts.

The district court is granted broad discretion in responding to jury questions. *United States v. Duvall,* 846 F.2d 966, 977 (5th Cir. 1988). When a deliberating jury expresses confusion and difficulty, the court must clear that confusion away with "concrete accuracy." *United States v. Stevens,* 38 F.3d 167, 169-

70 (5th Cir. 1994). We must ask whether the court's answer was reasonably responsive to the jury's question and whether the original and supplemental instructions as a whole allowed the jury to understand the issue presented to it. *Id.* at 170. "There is nothing wrong in responding in a narrow fashion allowing a jury to decide if the answer is responsive." *United States v. Stowell,* 947 F.2d 1251, 1257 (5th Cir. 1991), *cert. denied,* 503 U.S. 908, *and cert. denied,* 506 U.S. 902 (1992).

B.

The jury's question concerning the overt acts obviously signaled its confusion on this point. A jury's expression of confusion after deliberation imposes a heightened duty on the district court to eliminate that confusion. "When a deliberating jury expresses confusion and difficulty over an issue submitted to it, the trial court's task is to clear that confusion away with 'concrete accuracy.' " *Stevens,* 38 F.3d at 169-70. This task requires extreme care:

> Under those circumstances, a trial judge must be acutely sensitive to the probability that the jurors will listen to his additional instructions with particular interest and will rely more heavily on such instructions than on any single portion of the original charge. Thus, the court must exercise special care to see that inaccuracy or imbalance in the supplemental instructions do not poison an otherwise healthy trial.

*United States v. Carter,* 491 F.2d 625, 633 (5th Cir. 1974). While the district court has wide latitude in crafting responses

to the jury's questions, the supplemental instruction must be reasonably responsive in clearing that confusion with "concrete accuracy." *Stevens,* 38 F.3d at 170.

The government would have us place the burden of clearing up the confusion on the jury, stating that "[i]f the district court's response was unhelpful, the jury could have asked the court one or more additional clarifying questions." In support of this proposition, the government cites *Stowell.*

In *Stowell,* the jury sent out a note during deliberations asking, "Can any defendant whom we find was not entrapped become an ignorant pawn of the government and in turn entrap another defendant?" 947 F.2d at 1257. The court responded with a simple "Yes." *Id.* The defendants in *Stowell* argued that the response was inadequate because "the jury essentially asked for a clarification on the applicable burden of proof." *Id.* We determined that the response was adequate because it was correct and concise, concluding, "[t]here is nothing wrong in responding in a narrow fashion allowing the jury to decide if the answer is responsive." *Id.*

*Stowell is* distinguishable from the instant case. In *Stowell,* the jury's question called for a simple "yes" or "no" answer. Neither party disputed that the answer given was correct, but the defendants argued that the court should have elaborated more. *Id.*

In the case at bar, the answer called for was more than 'yes' or 'no,' and the court's answer was incorrect and confusing. The court referred the jury to the indictment for the overt acts, even though the court had redacted the overt acts from the indictment given to the jury. The court referred the jury to the

closing arguments, which, while discussing various acts, did not label them "overt acts." The issue is not, as in *Stowell*, whether the court should have elaborated more in its answer even though it was correct, but whether, instead, the court's answer was correct at all.

C.

Although the answer to the jury's question was erroneous, the defendants did not object. Thus, we review for plain error only. *See United States v. Olano*, 507 U.S. 725, 731-32 (1993); *Calverley*, 37 F.3d at 162. Plain error is not reversible unless it affects the defendants' substantial rights. *Olano*, 507 U.S. at 732; *Calverley*, 37 F.3d at 164.

As we stated in *Calverley*, in most cases, for an error to affect substantial rights, "it must affect the outcome of the proceeding." 37 F.3d at 164. The defendants have the burden of persuasion. *Id.* Thus, for the error to justify reversal under plain error review, the defendants must establish that if the court had properly instructed the jury, they would have been acquitted. The defendants have not made this showing.

VII.

The defendants challenge the adequacy of the jury instructions. We afford the district court substantial latitude in framing instructions to the jury. *United States v. Smithson*, 49 F.3d 138, 142 (5th Cir. 1995). The refusal to give a requested instruction is reviewed for abuse of discretion. *Id.* When reviewing challenges to instructions, we take into account the court's charge as a whole and the surrounding context of the trial, including arguments made to the jury. *Flores*, 63 F.2d at 1374. To prevail, the defendants must demonstrate that the

requested instruction "(1) was a correct statement of the law, (2) was not substantially covered in the charge as a whole, and (3) concerned an important point in the trial such that the failure to instruct the jury on the issue seriously impaired the defendant's ability to present a given defense." *Smithson, 49* F.3d at 142.

The defendants contend that the district court erred by redacting the overt acts alleged in the indictment and by deleting the provision in the pattern jury instruction that refers to the overt acts in the indictment.[6] The defendants submitted six different jury charges that referred to overt acts.[7] The defendants

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6. The court deleted the following paragraph from the *Fifth Circuit Pattern Jury Instructions*, § 2.21 (1990):

> **Third:** That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the overt acts described in the indictment, in order to accomplish some object or purpose of the conspiracy.

7. The first proposed charge relating to overt acts stated the following:

> Mere knowledge or approval, without participation, does not make one a party to a conspiracy. Mere association does not establish a conspiracy. There must be intentional participation in the conspiracy with a view to the furtherance of the common design and purpose to violate the law. The doing of an act which may unknowingly further any such conspiracy or without the intent to further such conspiracy is not sufficient.

(Cont'd)

contend that the deviation from their proposed charges impaired

(Cont'd)

The second proposed charge stated, in pertinent part:

> The government must prove the following three (3) essential elements beyond a reasonable doubt:
>
> . . .
>
> Two: At some time during the existence or life [sic] the conspiracy, one of the Defendants knowingly performed one of the overt acts charged in the Indictment in order to further or advance the purpose of the agreement to violate the law. . . .

The third proposed charge stated:

> The essential elements of a conspiracy are an agreement by two or more persons to combine efforts for an illegal purpose and an overt act by one of the members in furtherance of the agreement to violate the law.

The fourth proposed charge stated, in pertinent part:

> The evidence before the jury must show beyond a reasonable doubt . . . that one of the Defendants engaged in an overt act to further the illegal goal of the conspiracy. . . . the doing of an act which was not intended to further the conspiracy does not make someone a member of the conspiracy or a conspirator.

The next charge relating to over acts stated:

> Evidence has been received in this case that certain persons, who are alleged in the Indictment to be a co-conspirator have done or said things during the

(Cont'd)

their ability to show that all the acts charged by the grand jury were not intended to further an unlawful agreement or were never proven.

The district court did not abuse its discretion in submitting jury instructions without the overt acts alleged in the indictment. The court's instructions to the jury *did* include a statement that the overt acts must be in furtherance of the conspiracy. To that extent, the defendants' requested charge was substantially covered by the court's charge.

At oral argument, the defendants added a new twist to their theory. While admitting that the court's charge did indeed include a statement that the act must be "in furtherance of the conspiracy," they claimed the charge was deficient because it did not say that the overt act must be committed by the conspirator or be committed during the time of the conspiracy.

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(Cont'd)

> existence or life of the alleged conspiracy in order to further or advance its goal(s). . . . Before even considering such acts or statements you must find beyond a reasonable doubt that a conspiracy existed, that the person was a knowing member of the conspiracy and that the act or statement was made in furtherance of the conspiracy.

The final charge to discuss overt acts contained the following:

> The government must prove beyond a reasonable doubt that one of the members to the conspiracy knowingly performed at least one overt act and that this overt act was performed during the existence or life of the conspiracy and was done with the specific intent to further [sic] ojbect of the conspiracy.

*Appendix B*

In addition to being untimely, the argument fails because defendants have not explained how this seriously impaired their ability to present a defense. There is no indication that the government relied on acts by anyone other than the defendants or acts that were outside the time frame of the co-conspirators' agreement.

The defendants' second argument is that the court's instructions on the overt act requirement amounted to an abuse of discretion because the court essentially instructed the jury to find the defendants guilty. The court's instructions substantially conform to the instructions the defendants contend would be correct.

The court provided the jury with a special verdict form,[8] a

8. Following the guilty/not guilty question, the special verdict contained the following questions:

> If you find the defendant guilty, answer the following questions:
>
> 1. What statutes do you find the defendant was guilty of conspiring to violate?
>
> A. Knowingly engaging in misleading conduct toward another person with the intent to cause and induce another person to withhold testimony, records, documents, or other objects from a federal grand jury
>
> B. Corruptly influencing, obstructing, or impeding, or endeavoring to influence, obstruct, or impede the due administration of justice
>
> C. Knowingly making a false material declaration under oath before a grand jury.

(Cont'd)

copy of the indictment with the alleged overt acts redacted, and the following verbal instruction:

> The form verdict starts out with the name of the defendant and determination of whether that defendant is guilty or not guilty. Obviously, if a defendant is not guilty, you don't need to proceed with answering or filling in the balance of this. You simply need to turn it over and have the foreperson sign and date the document.
>
> If you find any defendant guilty, that is, if you find that this conspiracy existed as the government has alleged existed, then you must proceed to the A, B, C sections and each of you, or all of you, must unanimously agree. If you find any one of these existed, you must all agree not only that the section is the one that you agree was violated unanimously, but you must also agree on the act that you believe constitutes the violation of that particular section. And that's why you have the section two over here where it says "did you agree unanimously on a specific overt act which was committed in furtherance of the conspiracy to commit each of the offenses you checked on question one above?" And you will answer that "yes."

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(Cont'd)

> 2. Did you agree unanimously on at least one specific overt act which was committed in furtherance of the conspiracy to commit each of the offenses you checked in question 1 above?

That has to be answered "yes," and the reason it has to be answered "yes" is because you should not fill in the space if you don't have a unanimous agreement as to the violation.

Now, if you have a violation, if you believe that there is a conspiracy as to — and cannot agree — well, let me just — well, let's start that over.

You must unanimously agree upon the statute that you believe — or statutes — it could be A, B, C or it could be A or B, or C. There is a combination of ways this could occur.

If you agree unanimously upon the statute, let's go ahead and check that bloc, as agreeing if you reach agreement on that, assuming that you believe and find the defendants guilty, and then proceed to the second question which tells you then, do you agree upon a specific act, the overt act, that constitutes the violation of the statute. And if I've confused you totally, then you can go back and read the instructions.

Taken as a whole, the court's instructions provided the jury with sufficient guidance. The contention that the verbal instruction amounted to an instruction that the jury find the defendants guilty is based on creative underlining.

*Appendix B*

VIII.

We reject the argument that § 1503[9] is void for vagueness. The defendants cannot raise a facial challenge to the constitutionality of § 1503.[10] Thus, all we must consider is an as-applied challenge.

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9. Section 1503 is reprinted below, with the omnibus clause italicized.

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States magistrate . . . or any . . . juror, or officer in or of any court of the United States, . . . in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, . . . or on account of his testifying or having testified to any matter pending therein, or injures any such . . . juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer [or] magistrate . . . in his person or property on account of the performance of his official duties, *or corruptly or by threats or force, or by any threatening letter of communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice* [violates this statute].

10. *United States v. Howard*, 569 F.2d 1331, 1336 n.9 (5th Cir.) (limiting challenges to § 1503 *for* vagueness *to* as-applied challenges), *cert. denied*, 439 U.S. 834 (1978). *See also United States v. McElroy*, 910 F.2d 1016, 1021 (2d Cir. 1990) ("vagueness challenges outside the context of the First Amendment are to be examined in light of the facts of the case, on an as-applied basis.").

*Appendix B*

A penal statute is not unconstitutionally vague if it "definer[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson* , 461 U.S. 352, 357 (1983). "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct which a defendant is charged." *United States v. National Dairy Corp.*, 372 U.S. 29, 32-33 (1962) (citations omitted).

The term "corruptly" is used in § 1503 in its ordinary sense, describing "[a]n act done with an intent to give some advantage inconsistent with the official duty and rights of others. . . ." *United States v. Reeves,* 752 F.2d 995, 998 (5th Cir. 1985) (citing *United States v. Ogle,* 613 F.2d 233, 238 (10th Cir. 1979)), *cert. denied,* 479 U.S. 837 (1986). The defendants' conduct sought to give their clients an advantage inconsistent with the duty to fully inform the grand jury. Thus, the conduct falls squarely within the ordinary meaning of § 1503, giving them notice that their acts were caramelized. *United States v. Harriss,* 347 U.S. 612, 618 (1954) (stating that "if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise").

The defendants' reliance on *United States v. Poindexter,* 951 F.2d 369 (D.C. Cir. 1991), *cert. denied,* 506 U.S. 1021 (1992), is misplaced. The statute at issue in *Poindexter* was 18 U.S.C. § 1505.[11] *Poindexter is* distinguishable because the

11. 18 U.S.C. § 1505 states in pertinent part:

(Cont'd)

alleged conduct — lying to Congress without the motive of gaining an advantage for oneself or another — did not fall within the core meaning of "corruptly." For this reason, and because judicial interpretation of the statute did not provide guidance to the word's meaning, the court concluded that the defendant was not on sufficient notice that his conduct was prohibited by the statute. *See id.* at 379-86. In fact, the *Poindexter* court specifically recognized that the conduct in the case *sub judice* falls within the core meaning of "corruptly" and would not give rise to a void-forvagueness challenge. 951 F.2d at 385-86.

## IX.

We affirm a jury verdict if a reasonable trier of fact could conclude that the elements of the offense were established beyond a reasonable doubt, viewing all evidence in the light most favorable to the jury's verdict and drawing all reasonable inferences to support the verdict. The evidence need not exclude every reasonable possibility of innocence. *United States v. Faulkner,* 17 F.3d 745, 768 (5th Cir.), *cert. denied,* 115 S. Ct. 193 (1994).

The crux of Boyle's challenge is that the conduct that he allegedly conspired to engage in would not violate § 1503 or § 1512. With regard to § 1512, Boyle contends that his

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(Cont'd)

> Whoever corruptly . . . influences, obstructs, or impedes or endeavors to influence, obstruct, or impede . . . the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House [violates the statute].

This provision of the statute is referred to as the omnibus clause.

interaction with potential grand jury witnesses would not violate the statute because he did not engage in misleading conduct toward a witness. Boyle also contends that his conduct could not violate § 1503 because his behavior was not corrupt.

There was sufficient evidence to support the jury's determination that Boyle misled Cescon. Before responding to the subpoena, Cescon conferred with Ivey and Smith. As a result of those conversations, he later spoke with Boyle and asked him for the account numbers. Boyle told Cescon that the foreign accounts may not be bank accounts. When Cescon asked Boyle for the account numbers, Boyle lied and told him that he did not know them.

Those two statements alone were sufficient to support the verdict. In addition, the evidence of a pre-existing conspiracy, and Cescon's attempts at trial to claim that the accounts may not have been bank accounts, further supported a conclusion that Boyle mislead Cescon about the nature of the accounts, and the purpose of doing so was to convince Cescon to omit the account numbers.

Boyle's claim that his behavior was not "corrupt" under § 1503 is also without merit. There was sufficient evidence that Boyle, as Ivey's lawyer, engaged in an attempt to impede the due administration of justice[12] for the purpose of gaining an advantage for his clients. *See Reeves,* 752 F.2d at 998.[13]

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12. Boyle does not challenge the sufficiency of the evidence that he impeded the due administration of justice. His only claim is that he did not do so corruptly.

13. The decision in *United States v. Aguilar,* 21 F.3d 1475, 1484 (9th Cir. 1994), *aff'd on other grounds,* 115 S. Ct. 2357 (1995), is inapplicable, (Cont'd)

*Appendix B*

X.

The defendants challenge the three-level enhancement under U.S.S.G. § 2J1.2(b)(2) (1992), which applies where "the offense resulted in substantial interference with the administration of justice." The commentary defines "substantial interference" to include "the unnecessary expenditures of substantial governmental or court resources." U.S.S.G. § 2J1.2, comment, note 1.

We review the district court's application of the sentencing guidelines *de novo* and findings of fact for clear error. *Minited States v. Harrington*, 82 F.3d 83, 86 (5th Cir. 1996). Due deference is given to the district court's application of the guidelines to the facts. *Id.*

Boyle's specific complaint is that the court did not make a specific finding that his conversation with Cescon caused an "unnecessary expenditure of substantial governmental or court resources." Boyle is incorrect. The court specifically relied on a presentence report ("PSR") that made such a finding. A PSR "generally bears sufficient indicia of reliability to be construed as evidence by the trial judge in making the factual determinations required by the sentencing guidelines." *United States v. Alfaro*, 919 F.2d 962, 966 (5th Cir. 1990). In addition, the court expressly found that Cescon's conduct led to a delay in both the investigation and the criminal trial.

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(Cont'd)
as the Ninth Circuit accepts the *ejusdem generis* interpretation of § 1503, which limits its reach to conduct influencing another person. This circuit has rejected that interpretation. *See United States v. Howard*, 569 F.2d 1331, 1333 (5th Cir.), *cert. denied*, 439 U.S. 834 (1978).

Smith also has failed to demonstrate that the findings were clearly erroneous. Smith argues that his enhancement was based on the incorrect finding that Smith had spoken with Grod and Cescon and had testified to the Houston grand jury.

Smith has failed to demonstrate that the court's conclusion that his conduct led to substantial interference is materially false. There was sufficient evidence to support a finding that Smith and Ivey coordinated the entire conspiracy, including Boyle's discussion with Cescon. In fact, Boyle's testimony that he appeared at the grand jury at Smith's request was sufficient to support an inference that Smith and Boyle worked closely together.

Thus, a conclusion that Smith, through Boyle, attempted to influence Cescon was not clear error. Moreover, the court properly relied on the PSR, and the fact that the conspiracy as a whole resulted in a substantial interference with the administration of justice, to justify Smith's enhancement.

AFFIRMED.

## APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS ENTERED JULY 24, 1995

[1]

**UNITED STATES DISTRICT COURT**
Southern District of Texas

UNITED STATES OF AMERICA

v.

**CHARLES WILLIAM BOYLE**

**JUDGMENT IN A CRIMINAL CASE**
(For Offenses Committed On or After November 1, 1987)
Case Number: 4:91CR00050-007

**Jerome J. Froelich, Jr.**
Defendant's Attorney

THE DEFENDANT:
[X] was found guilty on count(s) **12, on November 9, 1992** after a plea of not guilty.

| Title & Section | Nature of Offense | Date Offense Concluded | Count Numbers |
|---|---|---|---|
| **18 U.S.C. § 371 and 2** | **Conspiracy to defraud the United States, making a false material declaration before a grand jury.** | **04-09-91** | **12** |

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

*Appendix C*

* * *

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: **137-46-4601**

Defendant's Date of Birth: **August 30, 1952**

Defendant's USM No.: **41850-019**

Defendant's Mailing Address:
**3314 Inman Drive, N.E.**
**Atlanta, Georgia 30319**

Defendant's Residence Address:
**3314 Inman Drive, N.E.**
**Atlanta, Georgia 30319**

**July 7, 1995**
Date of Imposition of Judgment

s/ illegible
Signature of Judicial Officer

**KENNETH M. HOYT**
**UNITED STATES DISTRICT JUDGE**
Name & Title of Judicial Officer

7/21/95
Date

*Appendix C*

[2]

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **EIGHTEEN (18) MONTHS.**

[X] The Court makes the following recommendations to the Bureau of Prisons:
**None**

* * *

[X] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
[X] **as notified by the United States Marshal.**

* * *

[3]

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **TWO (2) YEARS.**

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime.

*Appendix C*

While on supervised release, the defendant shall not illegally possess a controlled substance.

While on supervised release, the defendant shall not possess a firearm or destructive device.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Financial Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).
The defendant shall also comply with the following additional conditions:

**STANDARD CONDITIONS OF SUPERVISION**

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

*Appendix C*

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

*Appendix C*

[4]

**FINANCIAL PENALTIES**

The defendant shall pay the following total financial penalties in accordance with the schedule of payments set out below.

| Count | Assessment | Fine | Restitution |
|---|---|---|---|
| 12 | $50 | -0- | -0- |
| Totals: | $50 | -0- | -0- |

**FINE**

No fines have been imposed in this case.

**RESTITUTION**

Restitution has not been ordered in this case.

**SCHEDULE OF PAYMENTS**

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

The total fine and other monetary penalties shall be due as follows:
[X] in full immediately.

* * *

All financial penalty payments are to be made to the Clerk of Court, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

*Appendix C*

[5]

**STATEMENT OF REASONS**

* * *

[X] The Court adopts the factual findings and guideline application in the presentence report except in paragraph 69, the Court finds the defendant has accepted responsibility, and is entitled to a 2 level decrease. In paragraph 70 and 72, the total offense level is 15. In paragraphs 11 through 47 regarding the offense conduct, the Court will not adopt those as findings of fact, but will adopt the jury's findings. The Court will submit its own version of findings of facts.

**Guideline Range Determined by the Court:**

Total Offense Level: **15**

Criminal History Category: **I**

Imprisonment Range: **18** to **24** months

Supervised Release Range: **2** to **3** years

Fine Range: **$4,000** to **$40,000**

[X] Fine waived or below the guideline range because of inability to pay.

Restitution: **N/A**

* * *

*Appendix C*

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the Court finds no reason to depart from the sentence called for by the application of the guidelines.

* * *

**APPROVED AS TO FORM:** s/ illegible